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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 572

IRVIN WINKLER, et al.,

Petitioners,

vs.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to the Court of Appeals of Maryland. The Petitioners (all members of the white race) were, at their own election, tried in the Criminal Court of Baltimore before the Court sitting as a jury, on the charge of conspiracy to disturb the public peace. This was the Fifth Count of the Indictment and is set forth at pages 10-11 of the Transcript of Record, references to which are hereafter designated "T". Prior to the trial on the merits, Petitioners, together with other defendants who were acquitted, filed a motion to quash the indictment and a demurrer to the indictment, which were overruled by the trial court.

Upon conclusion of the testimony, Judge Moser, sitting as a jury, found Petitioners guilty not only of the charge referred to above but also of the charge of riot. (First Count of the Indictment, T. pp. 7-8.) At the same time, the trial court acquitted fifteen of the defendants. Motions for a new trial and in arrest of judgment were filed. Hearing on these motions was held before the Supreme Bench of Baltimore City. These motions were granted on the riot count and overruled on the conspiracy count. Seven of the Judges of the Supreme Bench voted in favor of this action. Two of the Judges dissented, considering that the motions should have been granted as to both counts. The Trial Judge did not sit at the hearing on said motions.

Sentences were imposed upon Petitioners on March 22, 1949, as follows: Stanley Askin—one year in the House of Correction and $50.00 fine; Harold Buchman—eighteen months in the House of Correction and $50.00 fine; the remaining Appellants, Leonard Collidge, Irvin Winkler, Warren L. Vestal, Regina Silverberg and Charles M. Swann were sentenced to three months in the House of Correction and $10.00 fine. Sentences were suspended as to each of said Petitioners and probation was imposed for a period of two years.

QUESTIONS PRESENTED

Respondent respectfully submits that only one basic and controlling issue is presented by the Petition for Writ of Certiorari, viz.:

I.

Is Any Federal Constitutional Question Presented in This Case?

Respondent believes that, after consideration of the facts in this case and of the law applicable thereto, this Court

will determine that no Federal Constitutional question is involved; that, therefore, there is no basis for the issuance of the writ, as requested.

However, Petitioners, in their Brief, assert that two questions are presented which this Court can consider, viz.:

II.

Were Petitioners' Constitutional Rights Under the First and Fourteenth Amendments of the Constitution of the United States Abridged by Their Arrest and Conviction on the Charge of Conspiracy to Disturb the Peace?

III.

Did the Court of Appeals Err in Its Refusal to Examine the Evidence in the Case so as to Determine Whether the Constitutional Rights Asserted by Petitioners Had Been Abridged?

STATEMENT OF THE FACTS

The Young Progressives of Maryland (an organization of young people numbering amongst its members colored and white men and women of various religions and creeds) decided to test the policy of the Park Board of Baltimore City against inter-racial play on public park tennis courts (T., Askin, p. 77). Attention of the Court is directed to the fact that the action, hereinafter referred to, occurred during the Summer of 1948, the last Presidential election year, and shortly after the various nominating conventions, including that of the Progressive Party, headed by Mr. Henry Wallace, were held. Although the Young Progressives were not officially allied with the Progressive Party, according to Petitioner Buchman, said party did take official action in support of the test of the policy of the Park Board.

On July 3, 1948, the Young Progressives of Maryland by Stanley Askin, Director, made written request upon Mr. Harold S. Callowhill, Superintendent, Bureau of Recreation, that he notify the attendants of the tennis courts in Druid Hill Park that members of their organization should be permitted to use said courts on Sunday, July 11, 1948; that such permission should be granted regardless of the race, color or creed of the players. On July 6, 1948, this letter was forwarded by Mr. Callowhill to Mr. Charles A. Hook, Superintendent of Parks. On July 8, 1948, Mr. Hook wrote to Mr. Askin that "I regret that I cannot comply with your request because the Board of Recreation and Parks rules that there shall be segregation. * * *" (T. pp. 43-45).

Several days later, Mr. Askin telephoned Mr. Hook and requested an interview regarding this matter. Mr. Hook at first advised Mr. Askin that he saw no necessity for an interview. Finally, Mr. Hook told him to come on out. In addition to the representatives of the Department of Recreation and Parks, there were present at this meeting, held on July 8 or 9, 1948, Petitioners, Harold Buchman and Stanley Askin, a Mr. Brown (not otherwise identified), a photographer from the Afro-American, a reporter from the Afro-American and possibly one or two other persons (T. pp. 45-46). Mr. Hook stated that he could not show the representatives of the Young Progressives a rule of the Department regarding segregation on public tennis courts. However, he did offer to show them the minutes of the Board's ruling setting forth the policy regarding such segregation. *Mr. Hook suggested to Mr. Askin that "if it was a question of a Court test case, * * * then why didn't he just apply for the permit in the usual way, and state that it was going to be a mixed group, and * * * I know it will be denied, and then he would have a test case, * * *." Mr.*

*Hook further suggested that such procedure would "avoid embarrassment or any trouble that might arise * * * if they attempted to play tennis"* (T. pp. 46-47). To this suggestion, Messrs. Askin and Buchman replied that "they would obtain the permits as then seen fit" (T. p. 47).

Sometime during the week prior to July 11, 1948, the Young Progressives of Maryland made arrangements for an inter-racial tennis game with the Baltimore Tennis Club, a negro organization. The game was to be played at Druid Hill Park on July 11, 1948 at 2 P. M. Also during that week the Young Progressives had a notice mineographed regarding the proposed action to question the aforesaid segregation policy of the Park Board (T. pp. 63, 91). This notice read as follows:

"'Kill Jim Crow!"
"Demand Your Rights!"

"Organize to smash discrimination in recreational facilities. No law has ever been passed by the City Council stating that Negro and white citizens must use separate park facilities. On Sunday, July 11th at the Druid Hill clay tennis courts near Auchentoroly Terrace and Bryant Avenue (near the hot house) promptly at 2 P. M. Negro and white citizens are going to insist on their lawful rights to use these courts!

Be present to lend your support!
Sponsored by: The Young Progressives of Maryland
328 N. Charles Street, Plaza 2470

Henry Wallace Says: 'Jim Crow In America Has Got To Go'."

Some of these notices were distributed prior to the meeting with Mr. Hook, some afterwards. The notice was mailed to the membership of the Young Progressives (about five hundred); other copies were distributed by hand, but to whom and in what manner Mr. Askin could not state (T.

pp. 91, 107). Although all copies of the leaflet which were distributed were not identical, they were substantially the same (T. pp. 92-93; 196-7). Obviously, from the testimony of Petitioners' witnesses, a number of copies of the leaflet were distributed through the C. I. O. Seamen's Union (T. pp. 196-7; 201; 155; 172).

All of this activity was participated in by Petitioner Askin. Petitioner Buchman either participated in the discussions, decisions and acts or knew of, and acquiesced in, them. Mr. Buchman attended the interview with Mr. Hook; he was consulted by the Young Progressives regarding the action which they proposed to take and told them: "I saw no reason why they shouldn't proceed" (T. p. 107). He knew that the leaflets had been prepared and distributed (T. p. 108). Petitioner Winkler was a member of the Young Progressives and participated in the arrangements for the proposed action. He took out, in his own name, the permit for the courts on which they played. He arranged to meet the players at Pennsylvania and Fulton Avenues (a short distance from the Park). He met the players at that location and furnished his car as part of the transportation from that point to the Park (T. p. 198).

Permits for three courts in Druid Hill Park (reserved by the Park Board for white players) were obtained by white members of the Young Progressives. The Courts were reserved for 2:00 P. M., on July 11, 1948. At about 1:30 P. M., on that date, those who were to participate in the tennis game, both white and colored players, met at Pennsylvania and Fulton Avenues. They proceeded to the Park, arriving there just before 2 P. M. They took over the three reserved courts as follows: Petitioner Askin played on the same court with Albert Blank, one of the white defendants who was acquitted, and with two of the

male colored defendants who were acquitted (T. p. 57). Petitioner Winkler played on the adjoining court with Morris Kalish (white) and with James E. Robert (colored) and Royal Weaver, Jr. (colored) (T. p. 169). On the third court, Mary Coffee (colored) played with her sister Gloria (colored) and Mitzi Freishtat (white) and Jeannette Fino (white). Mary had arrived late and, wanting to play, took the place of some unnamed person who had started the game.

After they had played for about fifteen minutes, Captain Gaeng arrived with several of the Park police — all in uniform. He observed the tennis games for a few minutes and then went out with the other officers, on the court where Mr. Askin was playing. He called the group on that court together and advised them that mixed tennis was forbidden and requested that they stop. Mr. Askin showed him his permit. Captain Gaeng stated that he was not interested in the permit but that it was forbidden for them to play in a "mixed group, colored and white". At that point, Mr. Buchman, who was not a participant in any of the games, walked up to the group and, according to Captain Gaeng, Mr. Buchman stated: "We are not going to stop playing, and he told the group to go ahead and play". Thereupon, the police withdrew (T. pp. 56-58).

Captain Gaeng sent for additional police. When they arrived, about twenty minutes later, Captain Gaeng and his officers returned to the courts and again requested that the participants stop playing. The players again refused to stop. Captain Gaeng thereupon ordered the police to arrest the players. Several sat down on the tennis courts (T. pp. 187, 197, 198) and refused to be removed. Captain Gaeng gave instructions to pick them up bodily and take them to the wagon (T. p. 58).

The spectators, numbering between one hundred and fifty and three hundred, depending on whose testimony you believe, crowded close to the wire backstops. Petitioner Buchman said to an unidentified man "Get the rest of them up there" and the two of them urged the spectators to get close to the backstop (T. p. 186). The crowd was "milling around" before the officers went on the courts, and after the arrests started, people were "swarming in the drive" around the patrol wagon (T. p. 192). Several people, including Petitioners Buchman and Regina Silverberg urged the players to continue (T. pp. 184, 186, 188, 191, 192). The witness Wilkinson testified that Petitioner Buchman said to the spectators: "Don't let them get away with this" (T. p. 186). As arrests were made, the spectators began to yell and to sing and to shout encouragement to the players (T. pp. 183, 186, 189, 192, 194, 196, 200-1).

Patrolmen Banyus and Gray testified regarding the arrest of Regina Silverberg (T. pp. 187-8, 191). She was observed at the northeast corner of the tennis courts; she got up as the police passed and told the girls on the tennis courts "to keep playing, that the police could do nothing, * * *"; she shouted at the officers that they were "Fascists" and "were doing things against the law"; she had previously been warned by an officer not to shout so loudly and to keep quiet for she was inciting a riot; she stated that "I don't have to keep quiet. I am a taxpayer and this is a free country, and I can say what I want to"; as she was being arrested she resisted and said: "Take your arm off of me you Gestapo and Fascist, you cannot arrest me until I see my attorney"; she also said she was not going in a police car, that she wanted to go in the wagon and was accommodated. A number of people gathered in the roadway and three cars stopped in the road blocking traffic (T. pp. 188-9). Petitioner Silver-

berg admitted making some of the statements testified to by the police (T. p. 142). Mrs. Silverberg went to Druid Hill Park that day as a result of reading one of the leaflets, referred to above, which her husband had brought home. This leaflet had been picked up by her husband at the Union Hall and had been distributed by a group calling themselves "Seamen for Wallace" (T. pp. 139-140).

Petitioner Swann, according to the testimony of police, resisted arrest and made a motion with his arm as if he would strike one of the officers. He swore at them, asked "Is this what we fought for?", called the police Fascists and was generally out of hand (T. pp. 183, 187, 190). He was a member of the C. I. O. Seamen's Union, had learned of the proposed action through the leaflets left at the Seamen's Hall and had gone to Druid Hill Park for the express purpose of participating in the activities *although he did not play in the game* (T. pp. 155-157).

After the arrest of Petitioner Swann, Petitioner Collidge, who had been in the crowd yelling and waving his hands, jostled alongside of the police and insisted that they arrest him, stating: "Well, you are arresting your own people. You have no right to arrest this man. You are a Fascist, Gestapo agent, I am in sympathy with this man, I shall go along with him" (T. pp. 182-3, 190). Collidge also had gone to the Park that day as a result of having seen one of the leaflets at Union Hall (T. p. 201). Petitioner Vestal did and said substantially the same thing as Collidge (T. p. 191).

When Sergeant Bell asked Petitioner Winkler to stop playing, he refused to do so. When placed under arrest, Winkler sat down on the court and "we had to carry him off" (T. pp. 184, 193, 199).

Petitioners' witnesses corroborated the State's testimony to the effect that there was a considerable amount of sing-

ing of patriotic songs, particularly "America" and what was referred to as the Negro National Anthem (T. pp. 194, 196, 200, 201); also that ten or twelve players met at Pennsylvania and Fulton Avenues prior to going to Druid Hill Park for the game (T. pp. 194-5, 198); also that several of the players sat down on the courts when requested by the police to stop playing (T. pp. 197-8, 199-200); also that a number of statements were made such as "let them play", "This is America, not Germany", and similar expressions (T. pp. 193-4, 196, 200-1).

ARGUMENT

I.

IS ANY FEDERAL CONSTITUTIONAL QUESTION PRESENTED IN THIS CASE?

It is respectfully submitted that Petitioners have taken what is actually a very simple problem, and, by use of flowery language and a complex argument, have distorted it beyond all recognition.

Because of this, Respondent wishes first to consider exactly what was involved in the trial in the *nisi prius* court. Petitioners were tried in the Criminal Court of Baltimore on several charges, including that of conspiracy to disturb the peace (T. pp. 10-11). Disturbance of the public peace was recognized at common law as a criminal offense and is such today under the laws of the State of Maryland.

Wharton, *Criminal Law*, Vol. 1, Sec. 21, page 30:

> *"Disturbances of the public peace indictable at common law.* (1) Acts, therefore, provocative of public disturbance, are indictable though there be no English precedent for the indictment. Hence it has been held indictable to drive a carriage through a crowded street in such a way as to endanger the lives of the passers-by; to disturb a congregation when at religious

worship; to go about armed with dangerous and unusual weapons, to the terror of citizens; to raise a liberty pole in the year 1794, as a notorious and riotous expression of ill-will to the government; to tear down forcibly and contemptuously an advertisement set up by the commissioners, of a sale of land for county taxes; to agree to fight, though no fight takes place; to break into a house in the day or nighttime, and disturb its inhabitants; violently to disturb a town meeting, though the parties engaged were not sufficient in number to amount to riot; to attempt to kidnap another; *and, in short, to do any act which may create a public disturbance, provided that such be the natural consequence of the act.*" (Italics supplied.)

Wharton, *Criminal Law*, Vol. 2, Sec. 1881, page 2212:

"Breach of the peace occurs through personal violence, and also through acts or words, whether of turbulence and open disorder or of public indecorum. It includes saying or doing that which tends to provoke or incite others to violence; all acts and attempts to produce disorder by oral or written expression or communications for the purpose of weakening legal, religious, or moral restraints against excesses, in word or act, of emotions, affections, or desires; the saying or doing that which alarms or arouses terror or fear, or creates disquieting apprehensions, or disturbs the tranquillity and repose enjoyed by good citizens where order prevails."

Constitution of Maryland, Declaration of Rights, Article 5:

"That the inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of

> Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. * * *"

The utterance of abusive words "in such a place, as to attract a crowd of a hundred persons, and when that crowd is collected the party continues to use the same abusive language, nobody can tell whether the passions of the crowd may not be thereby inflamed, and whether they may not proceed to execute the vengeance which the party himself invokes and threatens" constitutes a breach of the peace. *Cohen v. Huskisson*, S. C. M. & H. 150; 6 *L. J. M. C.* 133; 1 Jur. 559; 150 English Reports (full reprint) 845, 847-8; *Com. v. Foley*, 99 Mass. 497, 499; *People v. Nesin*, 167 N. Y. Supp. 49; *People v. Wallace, et al.*, 83 N. Y. Supp. 130, 132-3.

In the case of *Cantwell v. Conn.*, 310 U. S. 296, 309-310, 84 L. Ed. 1213, 1221, this Court, although deciding the case in favor of the Appellant, conceded the foregoing to be the rule, saying (per Mr. Justice Roberts):

> "Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any

> proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

It is equally true that to conspire or combine to accomplish a criminal or unlawful purpose or to accomplish some purpose, not itself criminal or unlawful, by criminal or unlawful means is an indictable offense at common law.

In the leading case of *State v. Buchanan*, 5 H. & J. 317, at pages 351-352, the Court of Appeals of Maryland, through Judge Buchanan, discussed this question at some length and reached the following conclusions:

> "That a conspiracy to do any act that is criminal *per se*, is an indictable offense at common law, for which it can scarcely be necessary to offer any authority * * *. That a conspiracy is a substantive offence and punishable at common law, though nothing be done in execution of it."

In another leading conspiracy case, *Lanasa v. State*, 109 Md. 602, at page 607, the Court of Appeals of Maryland, through Judge Burke, said:

> "Upon the settled law of this State and upon the authority of well-reasoned cases in other jurisdictions, we cannot agree that the count assailed is in any respect defective, or that the judgment should be arrested. A conspiracy may be described in general terms, as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. It is not essential that the act intended to be done should be punishable by indictment. The *essence* of the offense consists in the *unlawful agreement and combination* of the parties; and, therefore, it is completed whenever such combination is formed,

> although no act be done towards carrying the main design into effect. 3 *Greenleaf on Evidence*, 2nd Ed., Secs. 89-91."

To the same effect, see also *Garland v. State*, 112 Md. 83, at pages 87-90; *Archer v. State*, 145 Md. 128, at pages 144-147; *Gillespie v. State*, 147 Md. 45, at pages 55-59.

In *Wharton's Criminal Law*, Volume 2, Section 1620, pp. 1888-9, it is stated that:

> "AND SO OF CONSPIRACY TO COMMIT BREACH OF THE PEACE. No doubt a conspiracy to get up a public disturbance is indictable, and pointed illustrations of this are found in cases which, in another relation, will be subsequently considered, *viz.*, conspiracies to hiss an actor from the stage, so as to stimulate a riot, and to prevent by violent means the introduction of the English language into a church. * * *"

Petitioners, in fact, do not question the constitutionality of the charge of conspiracy to disturb the public peace. Examination of Petitioners' brief in this case shows that there is not one word directed toward the contention that the law under which Petitioners were tried is unconstitutional. Their claim that their rights under the First and Fourteenth Amendments to the Constitution of the United States were abridged is based solely upon the contention that the policy or rule of the Park Board of Baltimore City regarding segregation of races on the public tennis courts is invalid. That policy or rule, as is hereinafter demonstrated, is only incidentally involved in this case.

Of course, there could be no possible claim that the law under which the charge in the fifth count of the indictment was laid is unconstitutional. As stated by Wharton, *supra*, "No doubt a conspiracy to get up a public disturbance is indictable". Under the Maryland cases referred to above,

it is a crime for two or more persons to combine "to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not itself criminal or unlawful, by criminal or unlawful means". It follows, therefore, that the only question presented to the trial court was one of fact, viz., did the evidence in the case support the charge in the indictment? The trial judge, sitting as a jury, so found. His finding, upon motion for a new trial, was considered by nine of the members of the Supreme Bench of Baltimore City. Under the rules of the Supreme Bench, the trial judge did not sit upon the hearing of said motion. Seven of the nine judges who heard the motion sustained the finding of the trial judge. As is hereinafter indicated (infra, pp. 15-16), under the laws of the State of Maryland, the only review which may be made of the evidence is upon a motion for a new trial. There is no appeal from the ruling on such motion. *Quesenbury v. State*, 183 Md. 570, 573; *Snyder v. Cearfoss*, 186 Md. 360, 366-367; *O'Donnell v. State*, 188 Md. 693, 699; *Lucich, et al. v. State*, ... Md. ....., (The Daily Record, February 24, 1950). In the latter case, decided by the Court of Appeals of Maryland on February 10, 1950, that Court said:

> "* * * We cannot review the action of the trial court in denying the motion for a new trial."

It is respectfully submitted that in this case this Court cannot review the evidence so as to determine whether or not the charge laid in the indictment was supported by the facts. Under the provisions of the Constitution of Maryland, Article 15, Section 5, it is provided: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as fact." In a long line of cases decided by the Court of Appeals of Maryland, beginning with *League v. State*, 36 Md. 257, it has been held that in a case where the accused has elected to be tried before the court without a jury, the

court is substituted for the jury and has the same duties and functions in passing upon the guilt or innocence of the accused. In such event, no question of the sufficiency of the evidence can be raised on appeal because the position of a judge in such a case is analogous to that of a jury and he is, therefore, the final judge of both the law and the fact. See also *Folb v. State,* 169 Md. 209, 211; *Berger v. State,* 179 Md. 410, 416; *Meyerson v. State,* 181 Md. 105, 112; *Smith v. State,* 182 Md. 176, 188-189; *Bright v. State,* 183 Md. 308, 318; *Peters and Demby v. State,* 187 Md. 7, 16-17; *Abbott v. State,* 188 Md. 310, 313; *Davis v. State,* 189 Md. 269, 274 (Adv. Shts.), 55 A. (2) 702, 704; *Hill v. State,* ..... Md. ....., 59 A. (2) 630, 633; *Swann v. State,* ..... Md. ....., 63 A. (2) 324, 325; *Slansky v. State,* ..... Md. ....., 63 A. (2) 599, 606; *Juratovac v. State,* ..... Md. ....., 69 A. (2) 247-248; *Grear v. State,* ..... Md. ....., The Daily Record, February 16, 1950; *Debinski v. State,* ..... Md. ....., The Daily Record, March 2, 1950.

The effect of the above quoted constitutional provision and of the decisions thereunder is to deprive an accused in a criminal case of the right of appeal to the Court of Appeals of Maryland where the only question which might be presented on such appeal is the legal sufficiency of the evidence. In other words, so far as the legal sufficiency of the evidence is concerned, the trial court in Maryland is the court of last resort.

No constitutional objection can be raised concerning this procedure. This Court has, on a number of occasions, said that the guarantees of the Federal Constitution do not include a guarantee that each accused will be tried according to Federal procedure. In this respect, the States are left to their own devices, provided that the judicial process is not reduced to a sham.

The case of *Fay v. People,* 332 U. S. 261, 91 L. Ed. 2043, challenged the constitutionality of the special or so-called "blue ribbon" jury as used in New York. In holding that such procedure did not abridge any of the Appellant's constitutional rights, this Court said at U. S. pp. 294-5, L. Ed. pp. 2063-4:

> "The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and courts are organized to convict. They must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court always has been careful not so to interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences.
>
> "We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice. The jury system is one which has undergone great modifications in its long history, see People v. Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247, and it is still undergoing revision and adaptation to adjust it to the tensions of time and locality."

In the case of *Bute v. Illinois,* 333 U. S. 640, 649, 92 L. Ed. 986, 991-2, the question was raised as to whether, in the case of a non-capital crime, the State is required to tender the assistance of counsel to the accused. This Court held that the State was not so obligated and, among other things, said:

> "* * * The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty

> without following the *federal* process of law as prescribed for the federal courts in comparable federal cases. It says merely 'nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.' This *due* process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions * * *.' Hebert v. Louisiana, supra (272 U. S. at p. 316, 71 L. Ed. 272, 47 S. Ct. 103, 48 A. L. R. 1102). * * *."

See also *Sparf v. United States,* 156 U. S. 51, 102, 39 L. Ed. 343, 361, where this Court said:

> "* * * Undoubtedly, in some jurisdictions, where juries in criminal cases have the right, in virtue of constitutional or statutory provisions, to decide both law and facts upon their own judgment as to what the law is and as to what the facts are, it may be the privilege of counsel to read and discuss adjudged cases before the jury."

See also *Gardner v. Michigan,* 199 U. S. 325, 333-4, 50 L. Ed. 212, 217; *Mallett v. North Carolina,* 181 U. S. 589, 598-9, 45 L. Ed. 1015, 1020.

However, consideration of the facts in the present case clearly shows that the trial judge, sitting as a jury, was justified in finding Petitioners guilty of the charge of conspiracy to disturb the peace. Petitioners argued below and contend here that they were not guilty of said charge for the reason that they were testing the validity of the aforesaid policy or rule of the Park Board. That did not make them immune from prosecution if they committed a crime in taking such action. The State did not charge at the trial

of this case, nor does it now contend, that *submission to arrest,* in itself, as means of testing the validity of a statute, constitutes a crime. *The State charged at the trial and now contends that the acts of Petitioners constituted a crime,* based on the facts set forth below, *because Petitioners agreed and combined to test the aforesaid Park Board policy by unlawful means, viz. disturbance of the public peace.*

All of the Petitioners knew that the Department of Recreation and Parks had an announced policy against tennis games on public courts involving members of the white and colored races. *That was the sole reason for the action which they took.* Messrs. Askin and Buchman knew of that policy as the result of the interview with Mr. Hook of the Park Board. In fact, they knew of it when the letter of July 3, 1948, was written. Mr. Winkler knew of that policy as a result of attendance at meetings of the Young Progressives of Maryland, at which it was determined that it should be tested. Mrs. Silverberg and Messrs. Collidge, Winkler, Vestal and Swann knew of that policy by reading the notice regarding the proposed meeting at Druid Hill Park.

All of the Petitioners knew that the means proposed to question this policy would necessarily involve a breach of the public peace.

The notice just referred to was prepared with the knowledge of Askin, Buchman and Winkler. That notice in part, reads as follows:

"Demand Your Rights!"

> "Organize to *smash* discrimination in recreational facilities. * * * Negro and white citizens are going to *insist* on their lawful rights to use these courts."
>
> *"Be present to lend your support!"*
>
> (Italics supplied.)

Petitioner Buchman admitted that the wording of this notice was "exuberant" and "militant" (T. p. 108). Clearly the language of the notice is intemperate. Such phrases as *"Kill Jim Crow!", "Demand your Rights!", "Organize to smash discrimination * * *", "Insist on their lawful rights"* (Italics supplied), all tended to inflame the minds of those persons sympathetic with the views of the organizers of this meeting. That they were intended to have that effect is the only inference which can be drawn from the evidence in this case. No other purpose could be involved in the request contained in the notice; viz. "Be present to lend your support!" In addition to this, the comments and actions of Petitioners who were spectators certainly were not peaceful (*supra*, pp. 7-10). Petitioner Buchman's injunction to an unidentified man "Get the rest of them (the crowd around the backstop) up there"; the crowd "milling around"; directions to the players "to keep playing, that the police could do nothing"; Mr. Buchman's statement to the spectators "Don't let them (the police) get away with this"; use of abusive language toward the police such as "Fascist" and "Gestapo"; — not only tended to cause a breach of the peace but actually, under the decisions referred to above, constituted disturbance of the peace.

There was no necessity for anyone other than two players, one Negro and one white, to be present at Druid Hill Park on the day in question if the sole intention was to question the validity of the Park Board policy by passive submission to arrest. The only purpose of having a large gathering attend the tennis game was to create a breach of the peace so that there would be no question about the parties being arrested. It was through no fault of Petitioners that the Park Police did not have a full scale race riot on their hands.

This possibility and the social concepts, prejudices, and fears which exist today in the minds of many people in these States may be regrettable and unjustified. *However, they are a reality.* They must be faced by any Southern State which desires to furnish equality of opportunities, and at the same time preserve harmony and peace between the two races. This condition may be reprehensible to many who view it from afar. But the possibility of its existence is not beyond understanding even in the Northern States. Therein have occurred the Harlem, Chicago, and Detroit race riots, (Myrdal, *An American Dilemma*, p. 566; Murray, *The Negro Handbook*, 1949, pp. 108-110, 190-191). More recently, in St. Louis, Missouri, on June 21, 1949, a public swimming pool was opened to both races. *Life* magazine for July 4, 1949, pages 30-31, reported:

> "* * * But when the city opened all of its swimming pools to Negroes on June 21 for the first time in history, progress stopped. That afternoon police had to escort 40 Negro swimmers through a wall of 200 sullen whites at the Fairground Park pool. After nightfall bands of white hoodlums took off after any Negroes found anywhere near the park, beating and kicking them *(opposite)*. It was 2 a.m. before police got things under control. Miraculously nobody was killed, but 15 persons were hospitalized, 10 of them Negroes. It was St. Louis' first serious race riot, and it underscored the inflexibility of the color-line barrier dramatized by the movie *Lost Boundaries* (pp. 64-66). Mayor Joseph Darst quickly took what for practical reasons was perhaps the only possible action. Segregation was restored to St. Louis swimming pools."

The same thing happened when the races were mixed in public swimming pools operated by the Department of the Interior in Washington, D. C. In the issue of *Time* magazine for July 11, 1949, on page 21 under a picture of the violence,

the following was reported under the heading "Not Ready Yet":

> "These pictures show what happened in the nation's capital last week when the Interior Department decided to enforce a non-segregation policy in public pools where only whites had swum before. The result was two days of small-scale rioting at the Anacostia pool, where 17-year-old Joan Sexton suffered two broken toes under the hoofs of a park policeman's mount *(left)* and eight other persons were injured in a series of nasty scrapes which were broken up finally by police. An Interior Department official blamed the rioting on 'Communist agitators,' regretfully closed the pools 'until further notice.' 'Washington,' observed the *Evening Star,* 'is not ready for non-segregated swimming.' "

In East St. Louis, Illinois, it was decided by the local Board of Education to have mixed schools on January 30, 1950, after exercising their right to have separate schools for 85 years. About 100 Negro students enrolled in schools previously attended only by white children. Two white children transferred to a school which had been all Negro. At one school there was a noticeable decrease in the number of white students. But police authorities even in that Northern State anticipated violence. All police officers were assigned to 12-hour shifts, detectives changed to their uniforms, and as many as six men rode in one squad car to guard against any outbreak on the first day of the integration. Nine squad cars were on duty, although normally there are only three in East St. Louis, and five cars from the St. Clair County sheriff's department stood by. (East St. Louis Journal, Jan. 30, 1950; New York Times, Jan. 31, 1950.)

And in Alton, Illinois, on January 23, 1950, 175 Negro students appeared at the white schools and attempted to secure admission to the classrooms. The Alton Evening

Telegraph, in its lead paragraph of the page-one-story said, "An air of tension prevailed throughout the Alton School system today as 175 Negro students appeared at white schools and sought admission * * *." After presenting themselves at white schools for three days, they returned to the schools provided for Negroes and brought suit to stop payment of State funds to the Alton School District. Various forms of racial disturbances followed. (Alton Evening Telegraph, Feb. 5 through 8, 1950.)

If these conditions exist in the North, it should be understood that they may exist to a greater extent in the more heavily mixed population of the South.

Referring again to the evidence in the case at bar — practically all of it either admitted or uncontradicted — it certainly was more than sufficient to support the fifth count in the indictment.

II.

WERE PETITIONERS' CONSTITUTIONAL RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES ABRIDGED BY THEIR ARREST AND CONVICTION ON THE CHARGE OF CONSPIRACY TO DISTURB THE PEACE?

Petitioners' argument that their constitutional rights, viz. of freedom of speech, press and assembly, were abridged, although not captioned in their brief, is in fact considered under several different sub-headings. Respondent's reply will consider them in the order in which they are presented in Petitioners' brief under appropriate sub-heads.

Respondent respectfully submits that this question is not properly before this Court. As has been stated heretofore in this brief, *the crux of the Fifth Count of the Indictment is that the Petitioners conspired to disturb the peace. Conspiracy to accomplish a lawful purpose by unlawful means is just as much a crime as conspiracy to accomplish an unlawful purpose* (cases cited under point I).

A.

Was There an Effective Rule of the Park Board of Baltimore City Concerning Segregation on Public Tennis Courts?

Petitioners argue (Pet. Brief pp. 20-22) that there was no legal prohibition against inter-racial games on public tennis courts in Druid Hill Park. As has been previously noted, this question is only incidentally involved in this case. The aforesaid Park Board rule or policy was simply the *raison d'etre* for Mr. Askin's letter of July 3, 1948, and for everything which followed. It was merely the background for the action at Druid Hill Park on July 11, 1948.

However, there was a legal prohibition against tennis games on public courts between members of the white and Negro races. Petitioners admit that certain courts in Druid Hill Park were reserved for members of the white race and that there were eight courts reserved for members of the Negro race. This was known to Petitioners. The Park Board of Baltimore City had adopted a policy or rule regarding segregation of the two races on public park tennis courts, even though it had not been enacted as a formal rule and printed in the Park Board rule book. All of the Petitioners were cognizant of the existence of this policy. The meeting at Druid Hill Park on July 11, 1948, and all the activities of Petitioners which preceded that meeting were directed toward questioning the validity of that policy or rule.

In Missouri there was no express constitutional provision requiring that the white and Negro races be separated for the purpose of higher education. The statute of that State provided for the establishment of a Negro law school. It did not, however, provide for segregation of the races so far as legal education was concerned. However, the Supreme Court of the State of Missouri and this Court considered

that there was an effective policy for segregation of the races for educational purposes. *Missouri ex rel Gaines v. Canada,* 305 U. S. 337, 83 L. Ed. 208, page 210. In that case, this Court found that the State of Missouri had failed to carry out that policy so far as law school education was concerned by providing equal facilities for the white and Negro races.

Respondent submits that, even if this Court deems it necessary to find a legal policy regarding segregation of the races on public tennis courts to support the judgment in this case, there is no doubt that there was such a legal and effective policy of the Park Board of Baltimore City and that Petitioners knew of it.

B.

Were Facilities Furnished by the Park Board of Baltimore City for Tennis Players of the Negro Race Equal to Those Furnished for Tennis Players of the White Race?

Were equal facilities afforded members of the two races for play on public tennis courts? Petitioners make no claim that the quality of the tennis courts provided for Negroes in Druid Hill Park was not equal to the quality of tennis courts provided for whites. Their sole contention (Pet. Brief pp. 22-23) is that there is not equality in the number of courts available to the two races. The equality rule certainly does not require that Baltimore City provide a tennis court reserved for Negroes for each tennis court reserved for whites. In fact, under the decision of the Court of Appeals of Maryland in *Durkee v. Murphy,* 181 Md. 259, this claim could not be made. Although there are three public golf courses available to white players, that Court said in that case that only the quality of the

Carroll Park course must be equal to the courses afforded for whites. That Court did not say that Baltimore City had to provide three golf courses for Negroes. A number of Negroes interested in tennis testified on behalf of Petitioners in this case. None of them claimed either that there are insufficient courts reserved for them or that the courts reserved for them are inconveniently located. Petitioners rely solely on the total statistics which show that one hundred and eight courts are reserved for white people and only eight courts for Negroes, and that the proportion of colored citizens in Baltimore City to white citizens is greater than that. Petitioners completely failed to demonstrate a need either for more tennis courts reserved for Negroes or for more locations of such courts.

Certainly, under the evidence in this case, the Court, sitting as a jury, could readily determine that equal public tennis facilities are provided by Baltimore City for members of the two races. Also, it is to be noted that in the case of *Boyer, et al v. Garrett, et al,* United States District Court for the District of Maryland, ... F. Supp. ....., (The Daily Record, Baltimore, Feb. 10, 1950), a civil suit questioning the aforesaid Park Board policy or rule filed subsequent to the institution of these proceedings, a stipulation was filed in which it was admitted for the purposes of that case that the public tennis court facilities afforded by Baltimore City for Negroes and whites are equal.

C.

Is Segregation of the Negro and White Races "Outmoded" and Unconstitutional?

Petitioners contend (Pet. Brief, pp. 23-31) that even if there is an effective rule of the Park Board of Baltimore City providing for segregation of the white and Negro races on public tennis courts, such rule is unconstitutional. The

rule of the Park Board in this respect was entirely proper and valid. In the case of *Plessy v. Ferguson,* 163 U. S. 537, 41 L. Ed. 256, this Court expressly held that segregation of the races does not contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, provided that the facilities furnished are equal. This Court there said (U. S. pp. 543-4; L. Ed. p. 258):

> "A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed, we do not understand that the 13th Amendment is strenuously relied upon by the plaintiff in error in this connection.
>
> * * * * * *
>
> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."

Although Petitioners contend that this case was decided by the Supreme Court in a "dark era" and is "outmoded", it is undoubtedly still the law in the United States. *Missouri ex rel Gaines v. Canada, supra; McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 160; 59 L. Ed. 169, 173-4; *Durkee v. Murphy, supra; Law v. Mayor and City Council of Baltimore*, 78 F. Supp. 346, 347; *Boyer, et al. v. Garrett, et al., supra.*

In discussing this claim, Petitioners cite thirty-seven cases, Congressional debates and reports concerning the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and the Report of the President's Committee on Civil Rights (U. S. Government Printing Office, 1947). In general, these cases cover the judicial history of the 14th Amendment in this Court from the Civil War to the present day. They run the gamut from the *Slaughterhouse Cases*, 16 Wall. 36, to and including *Terminiello v. Chicago*, ... U. S. ....., 93 L. Ed. 865. In between, they cover cases dealing with discrimination in railroad and bus accommodations; anti Klu Klux Klan Acts; the Civil Rights statute; exclusion of Negroes from juries; seventeen different kinds of discrimination in governmental classifications; extortion of confessions; laws directed at labor unions and subversive groups; segregation in schools, on golf courses and in swimming pools; the trials and tribulations of Jehovah's Witnesses; exclusion of Japs from land ownership and fishing licenses; and the validity of ordinances and covenants restricting use or ownership of lands. They ice the cake with an extract from the recent Report of the President's Committee on Civil Rights. By this recital, Respondent does not wish to make light of the importance of the 14th Amendment. *However, it is not involved in this case* in spite of the fact that Petitioners would like to persuade the Court that it is. The

only real question presented to the Trial Judge was: Did Petitioners get together and agree to question a Park Board policy, which they believed to violate the 14th Amendment, by unlawful means, viz. disturbance of the public peace? The trial court determined that they did and that decision is not subject to review by this Court. Finally, none of the cases cited, either disaffirms the rule of *Plessy v. Ferguson, supra,* or gives the slightest indication that said case is not the law of the land.

D.

Were Petitioners' Constitutional Rights of Freedom of Speech, Press and Assembly Abridged?

Petitioners' claim (Pet. Brief, pp. 31-35) that their constitutional rights of freedom of speech, press and assembly were abridged by the actions of the Park Board of Baltimore City and the Park Police and by their conviction under the charge of conspiracy to disturb the peace. As indicated above, Petitioners do not question the constitutionality of the charge. They attempt to bring into this case by the back door the question of whether the segregation policy or rule of the Park Board violates their constitutional rights. As has been previously stated, this policy or rule is only incidentally involved in this case, and, whether or not, if effective, it violates any of the constitutional rights of the Petitioners has nothing whatsoever to do with whether the judgment of the trial court should be affirmed.

The question of the validity of the Park Board policy regarding segregation of the races on public tennis courts has been already discussed (*supra,* pp. 26-29). As has been previously stated, the existence of the constitutional rights referred to does not guarantee immunity to prosecution in every case. Such rights are not absolute.

In the case of *N. L. R. B. v. M. E. Blatt Co.*, 143 F. (2d) (C. C. A. 3d) 268, 274, (certiorari denied, 323 U. S. 774, 89 L. Ed. 619), it was stated categorically that "the guaranty of freedom of speech contained in the First Amendment does not guarantee him who speaks immunity from the legal consequences of his verbal action."

In *Robertson v. Baldwin*, 165 U. S. 275, 281, 41 L. Ed. 715, 717, this Court said:

> "* * * The law is perfectly well settled that the first ten Amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion (*United States v. Ball*, 163 U. S. 662, 672; 41 L. Ed. 300, 303); nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment. *Brown v. Walker*, 161 U. S. 519; 49 L. Ed. 819; and cases cited. Nor does the provision that an accused person shall be confronted with the witnesses

> against him prevent the admission of dying declarations, or the deposition of witnesses who have died since the former trial."

Certainly, it cannot be argued that the right of freedom of assembly would bar a prosecution for riot nor can it be said that the right of freedom of the press would prevent prosecution on a charge, for example, of conspiracy to violate the Espionage Act *(Schenck v. U. S.*, 249 U. S. 47, 63 L. Ed. 470). It is equally true that neither the right of freedom of speech, nor the right of freedom of the press, nor the right of freedom of assembly endows Petitioners with immunity from prosecution on a charge of conspiracy to disturb the peace. As previously stated, the only question presented was whether the verdict of guilty was warranted under the evidence presented and that was a question of fact subject to the determination of the trial judge sitting as a jury and to his judgment alone.

Petitioners cite, and apparently rely heavily upon, the case of *Terminiello v. Chicago,* (..... U. S. ....., 93 L. Ed. 865, 867) *supra.* In that case an ordinance of the City of Chicago was involved. The note on page 867 (L. Ed.) quotes from that ordinance as follows:

> "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city * * * shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense."

Instructing the jury, the trial court defined the words "breach of the peace" to include speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance". The charge against

the defendant was based upon language used by him in a speech under the auspices of the Christian Veterans of America. The auditorium in which the speech was made was filled with over eight hundred persons. There were about one thousand persons gathered outside the auditorium protesting the meeting.

The majority of this Court held that the ordinance as "read" and "construed and applied" by the trial court violated the 14th Amendment. The case was reversed solely because of the quoted interpretation of the trial court. This Court determined that, *as interpreted by the trial court,* the ordinance constituted an abridgment of the Appellant's freedom of speech.

It is respectfully submitted that the *Terminiello* case is clearly distinguishable from that presented here. In that case, there was a direct attack on the constitutionality of the ordinance as construed by the trial court. In the present case, no attempt whatsoever has been made to question the constitutionality of the law under which the Petitioners were charged and tried.

In their brief filed in the Court of Appeals of Maryland, Petitioners also cited and relied heavily upon the case of *Schenck v. U. S., supra.* It is worthy of note that in their brief filed in this Court in support of the Petition for the writ of certiorari, Petitioners fail to refer to that case. The reason for such failure is obvious. It is almost on all-fours with the present case.

There, the indictment charged the Appellants with conspiracy to violate the Espionage Act of 1917 by, among other things, obstructing the recruiting and enlistment service of the United States while the United States was at war with the German Empire. In support of the charge, the

Government proved that, with the knowledge and consent of the Appellants, fifteen thousand leaflets had been printed and distributed. In describing the leaflet, Mr. Justice Holmes said:

> "In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity, in the interest of Wall Street's chosen few. It said: 'Do not submit to intimidation;' but in form at least confined itself to peaceful measures, such as a petition for the repeal of the act. The other and later printed side of the sheet was headed, *'Assert Your Rights'*. It stated reasons for alleging that anyone violated the Constitution when he refused to recognize 'your right to assert your opposition to the draft', and went on: 'If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.' It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the Conscription Law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, etc., etc., winding up, *'You must do your share* to maintain, support, and uphold the rights of the people of this country.' *Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.* The defendants do not deny that the jury might find against them on this point." (Italics supplied.)

The Supreme Court had no difficulty in determining that the conviction of the Appellants was proper and affirmed the judgment of the trial court. Mr. Justice

Holmes' reference to the leaflet, italicized above, is pertinent, if not conclusive, here.

Finally (Petitioners' Brief, p. 32) Petitioners state that the prosecution urged that the policy was justified in order to avoid possible disorder which might ensue where the Negro and white races participated jointly in a sports program on public facilities. Respondent's contention below was, and here is, that the actions of the Petitioners constituted a conspiracy to disturb the peace. Justification of the policy regarding segregation is based upon a long-standing policy of the State of Maryland which has, in fact, received support from this Court. Petitioners also claim that, because of the fact that they were allegedly testing a disputed right, their various freedoms have been infringed. The mere fact that Petitioners were attempting to question or test a disputed right does not make the effect of the constitutional provisions absolute. They were obliged to choose a method of attack which would not violate the criminal laws of the State of Maryland. The responsibility for electing the method which in fact did contravene the criminal laws of the State lies upon the heads of the Petitioners—not the Respondent. The appropriate and proper method of testing the restrictions to which Petitioners objected was suggested to them explicitly by Mr. Charles A. Hook, Superintendent of Parks of Baltimore City (T. 46-47).

III.

DID THE COURT OF APPEALS ERR IN ITS REFUSAL TO EXAMINE THE EVIDENCE IN THE CASE SO AS TO DETERMINE WHETHER THE CONSTITUTIONAL RIGHTS ASSERTED BY PETITIONERS HAD BEEN ABRIDGED?

Although it is not clear how it adds any light to this case, Petitioners' final contention is that the Court of Appeals of Maryland erred in its refusal to examine the evi-

dence in the case so as to determine whether the constitutional rights asserted by Petitioners were infringed.

Examination of the majority opinion of the Court of Appeals of Maryland makes it abundantly clear that said Court had no right whatsoever to re-examine the evidence in this case. (See cases cited supra, pp. 15-16). The only possible exception to the rule is in a case where the trial was so unfair as to amount to a denial of due process under the 14th Amendment. *Raymond v. State,* ..... Md. ....., 65 A. 2d 285, 288. In the present case, the Court of Appeals did consider claims by Petitioners that the trial court was unfair and that they were, therefore, denied due process of law. It is interesting to note that those claims have been abandoned in Petitioners' Brief filed in this Court.

CONCLUSION

Petitioners complain that, to refuse to issue the writ in this case, will result in the curtailment of freedom of speech, press and assembly; that "the ghetto wall between white and black will rise higher, the perpetrators of discrimination in public recreational facilities will rejoice, the building of amity among the peoples of the United States will receive a severe set-back" (Pet. Brief, p. 38). Calm and dispassionate consideration of the facts will show that, if the convictions stand, the decision will have no effect one way or the other on the question of the legality of segregation of the races on public recreational facilities. Such a decision would merely constitute a finding that these Petitioners have not, in this case, properly presented an issue of infringement of some constitutional right; that only the violation of a law of the State of Maryland is involved. It could not possibly have the effect asserted by Petitioners. Whether *Plessy v. Ferguson, supra,* is still the law of the land could be questioned in a proper proceeding. In fact

it is being questioned at the present time in the case of *Boyer, et al. v. Garrett, et al., supra,* (Proceedings under Civil Rights Act, 8 U. S. C. A. sections 43 and 47).

On the other hand a decision favorable to Petitioners would at the most determine that the procedure adopted by the State of Maryland *in this case* abridged Petitioners' constitutional rights of freedom of speech, press and assembly. *It could not possibly determine the validity of the policy of the Park Board of Baltimore City concerning segregation of the Negro and white races on public tennis courts.*

It is respectfully submitted, therefore, first, that no federal question is presented in this case which this Court can consider and, second, that even if this Court could review the decision of the Court of Appeals of Maryland, the Petitioners were not in any way deprived of their rights of freedom of speech, press and assembly. The petition for the writ of certiorari should, therefore, be denied.

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